

³ The Board notes that, following the July 29, 2020 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$101,944.10, for which she was without fault, as she concurrently received Social Security Administration (SSA) age-related retirement benefits and FECA wage-loss compensation for the period June 1, 2009 through July 20, 2019 without appropriate offset; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

FACTUAL HISTORY

On April 5, 2004 appellant, then a 56-year-old medical technician, filed a traumatic injury claim (Form CA-1) alleging that on April 1, 2004, she sustained a back injury when drawing blood from an infant while in the performance of duty. OWCP initially accepted the claim for lumbar strain, and later expanded its acceptance of the claim to include permanent aggravation of facet arthropathy, lumbar degenerative spondylosis at L4-5 and L5-S1, and radiculopathy of the left lower extremity. Appellant stopped work on March 5, 2007. OWCP paid her wage-loss compensation on the supplemental rolls as of March 11, 2007 and on the periodic rolls as of July 8, 2007.

On May 29, 2013 OWCP provided SSA with a Federal Employees Retirement System (FERS)/SSA dual benefits calculation form for its completion. On July 3, 2013 it received a FERS/SSA dual benefits calculation transmittal form indicating appellant's SSA benefit rates with a FERS offset and without a FERS offset from June 2009 through December 2012. Beginning June 2009, December 2009, and December 2010, the SSA rate with FERS was \$1,045.60 and without FERS was \$433.00. Beginning December 2011, the SSA rate with FERS was \$1,083.20 and without FERS was \$448.50. Beginning December 2012, the SSA rate with FERS was \$1,101.60 and without FERS was \$456.10.

On June 1, 2018 OWCP provided SSA with a FERS/SSA dual benefits calculation form for its completion, but no response was received. On June 3, 2019 it again provided SSA with a FERS/SSA dual benefits calculation form for its completion.

On June 24, 2019 OWCP received the FERS/SSA dual benefits transmittal form indicating SSA benefit rates with a FERS offset and without a FERS offset from June 2009 through December 2018. Beginning June 2009, December 2009, and December 2010, the SSA rate with FERS was \$1,045.60 and without FERS was \$454.60. Beginning December 2011, the SSA rate with FERS was \$1,083.20 and without FERS was \$471.00. Beginning December 2012, the SSA rate with FERS was \$1,101.60 and without FERS was \$479.00. Beginning December 2013, the SSA rate with FERS was \$1,482.70 and without FERS was \$486.20. Beginning December 2014 and December 2015, the SSA rate with FERS was \$1,507.90 and without FERS was \$494.40. Beginning December 2016, the SSA rate with FERS was \$1,512.40 and without FERS was \$495.80. Beginning December 2017, the SSA rate with FERS was \$1,542.60 and without FERS was \$505.70. Beginning December 2018, the SSA rate with FERS was \$1,585.70 and without FERS was \$519.80.

By letter dated July 30, 2019, OWCP notified appellant that, based on information provided by SSA regarding the amount of her age-related retirement benefits attributable to her federal service, it had adjusted her FECA wage-loss compensation and that she would now receive \$2,460.09 every 28 days after the SSA offset.

In a worksheet dated July 29, 2019, OWCP calculated a total overpayment of \$101,944.10 for the period June 1, 2009 through July 20, 2019 due to its failure to apply the SSA/FERS offset to her wage-loss compensation for that period.

In a preliminary determination notice dated August 8, 2019, OWCP informed appellant that she had received an overpayment of compensation in the amount of \$101,944.10 because the SSA/FERS offset was not applied to payments for the period June 1, 2009 through July 20, 2019. It determined that she was without fault in the creation of the overpayment, because OWCP erred in not calculating her SSA/FERS offset and deducting the offset from her monthly compensation payments and it was not shown that she had actual knowledge of the calculation error. With its preliminary determination, OWCP provided a worksheet that used the figures provided by SSA noting each period of overpayment and providing calculations, resulting in a total overpayment amount of \$101,944.10 for the period June 1, 2009 through July 20, 2019. OWCP requested that appellant submitted a completed overpayment recovery questionnaire (Form OWCP-20) to determine a reasonable repayment method, and advised her that she could request a waiver of recovery of the overpayment. It requested financial information, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support income and expenses. OWCP advised appellant that it would deny waiver if she failed to furnish the requested financial information within 30 days. It further notified her that, within 30 days of the date of the letter, she could contest the overpayment and request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing.

On August 19, 2019 appellant requested a telephonic prerecoupment hearing before a representative of OWCP's Branch of Hearings and Review. She contested the fact and amount of the overpayment and requested waiver of recovery of the overpayment.

On August 26, 2019 appellant submitted a completed Form OWCP-20 and reported the income she received from SSA benefits, FECA benefits, her spouse's employment income, and rental income, household monthly income was listed as totaling \$11,448.09. Appellant also listed specific expense amounts for her monthly rent/mortgage, food, clothing, utilities, and other expenses, as well as debts being paid by monthly installments, monthly expenses were listed as totaling \$8,033.73. Assets were listed as totaling \$183,266.17. On January 14, 2020 appellant submitted supporting financial documentation regarding her reported income, expenses, assets, and debts.

A hearing was held on December 12, 2019.⁴

By decision dated February 12, 2020, the hearing representative finalized the preliminary determination notice dated August 8, 2019, finding that appellant had received an overpayment of compensation in the amount of \$101,944.10 because the FERS offset was not applied to payments for the period June 1, 2009 through July 20, 2019. The representative further found that she was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment. The hearing representative required recovery of the overpayment by monthly payments of \$900.00 with interest.

⁴ By decision dated February 4, 2020, OWCP terminated appellant's wage-loss compensation benefits. Appellant's claim remained open for payment of medical benefits.

By decision dated February 19, 2020, OWCP finalized its determination that appellant had received an overpayment of compensation in the amount of \$101,944.10 because the FERS offset was not applied to payments for the period June 1, 2009 through July 20, 2019. It further found that she was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment. OWCP required recovery of the overpayment by monthly payment of \$900.00. It noted that interest would begin to accrue as of the debt of the letter at the rate of the U.S. Treasury Note.

On May 20, 2020 appellant, through counsel, requested a change in her repayment plan for the overpayment due to loss of rental income.

By decision dated July 20, 2020, a hearing representative noted that section 8128 of FECA provided that the Secretary of Labor, or his or her designee, may review an award for or against payment of compensation at any time on his or her motion. The hearing representative set aside the February 19, 2020 decision and remanded the case for an amended finalized overpayment decision, as there was a technical error regarding the interest rate. The hearing representative also altered the repayment schedule to \$800.00 monthly in consideration of the reported loss of anticipated income from rental property.

By decision dated July 29, 2020, OWCP issued an amended overpayment decision that appellant had received an overpayment of compensation in the amount of \$101,944.10 because the FERS offset was not applied to payments for the period June 1, 2009 through July 20, 2019. It further found that she was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment, referring to the July 20, 2020 decision. OWCP required recovery of the overpayment by monthly payments of \$800.00.

LEGAL PRECEDENT

Section 8102 of FECA provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁵ Section 8116 limits the right of an employee to receive compensation. While an employee is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States.⁶

Section 10.421(d) of the implementing regulations requires that OWCP reduce the amount of compensation by the amount of SSA benefits that are attributable to federal service of the employee.⁷ FECA Bulletin No. 97-09 provides that FECA benefits have to be adjusted for the FERS portion of SSA benefits because the portion of the SSA benefit earned as a federal employee is part of the FERS retirement package, and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit.⁸

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 8116.

⁷ 20 C.F.R. § 10.421(d); *see S.O.*, Docket No. 18-0254 (issued August 2, 2018); *L.J.*, 59 ECAB 264 (2007).

⁸ FECA Bulletin No. 97-09 (February 3, 1997).

ANALYSIS -- ISSUE 1

The Board finds that fact of overpayment has been established.

The evidence of record indicates that, while appellant was receiving compensation for wage-loss compensation benefits under FECA, she was also receiving SSA age-related retirement benefits based upon her federal service. A claimant cannot receive both wage-loss compensation under FECA and SSA age-related retirement benefits attributable to federal service for the same period.⁹ The information provided by SSA established that appellant received SSA age-related retirement benefits that were attributable to federal service during the period June 1, 2009 through July 20, 2019 without appropriate offset. Consequently, the fact of overpayment has been established.

The Board further finds, however, that this case is not in posture for decision with regard to the amount of the overpayment.

To determine the amount of the overpayment, the portion of SSA's benefits that were attributable to federal service must be calculated. OWCP received two conflicting dual benefits calculation worksheets from SSA with respect to the specific amount of SSA age-related retirement benefits that were attributable to federal service.

On July 3, 2013 OWCP received a form reporting appellant's SSA benefit rates with a FERS offset and without a FERS offset from June 2009 through December 2012. Beginning June 2009, December 2009, and December 2010, the SSA rate with FERS was \$1,045.60 and without FERS was \$433.00. Beginning December 2011, the SSA rate with FERS was \$1,083.20 and without FERS was \$448.50. Beginning December 2012, the SSA rate with FERS was \$1,101.60 and without FERS was \$456.10.

On June 23, 2019 OWCP received a form indicating SSA benefit rates with a FERS offset and without a FERS offset from June 2009 through December 2018. Beginning June 2009, December 2009, and December 2010, the SSA rate with FERS was \$1,045.60 and without FERS was \$454.60. Beginning December 2011, the SSA rate with FERS was \$1,083.20 and without FERS was \$471.00. Beginning December 2012, the SSA rate with FERS was \$1,101.60 and without FERS was \$479.00. Beginning December 2013, the SSA rate with FERS was \$1,482.70 and without FERS was \$486.20. Beginning December 2014 and December 2015, the SSA rate with FERS was \$1,507.90 and without FERS was \$494.40. Beginning December 2016, the SSA rate with FERS was \$1,512.40 and without FERS was \$495.80. Beginning December 2017, the SSA rate with FERS was \$1,542.60 and without FERS was \$505.70. Beginning December 2018, the SSA rate with FERS was \$1,585.70 and without FERS was \$519.80.

The figures provided on July 3, 2013 differed from the figures provided on June 23, 2019 regarding appellant's SSA benefit rates without FERS, but OWCP did not seek clarification from SSA as to which set of figures was correct or why they differed. The reason for the discrepancy is unclear from the record. Because of the unexplained discrepancy, the Board is not in a position to determine whether OWCP's finding regarding the amount of overpayment (\$101,944.10) is

⁹ *Id.* See also *P.B.*, Docket No. 20-0862 (issued November 25, 2020); *N.B.*, Docket No. 18-0795 (issued January 4, 2019).

accurate.¹⁰ On remand, OWCP shall seek clarification from SSA regarding the conflicting information it provided regarding the SSA payments appellant was entitled to receive without FERS offset. It shall then issue a new preliminary overpayment determination with an overpayment action request form, a Form OWCP-20, and instructions for appellant to provide supporting financial information. After such further development as deemed necessary, OWCP shall issue a *de novo* decision.¹¹

CONCLUSION

The Board finds OWCP has established that appellant received an overpayment of compensation. The Board also finds that this case is not in posture for decision regarding the amount of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the July 29, 2020 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further action consistent with this decision.

Issued: September 3, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹⁰ See *R.C.*, Docket No. 17-0058 (issued August 3, 2017); *E.H.*, Docket No. 16-1465 (issued December 19, 2016); *K.G.*, Docket No. 16-0553 (issued June 21, 2016).

¹¹ In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.